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No._____

Supreme Court, U.S.
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# In the Supreme Court of the United States

OCTOBER TERM, 1991

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DENNIS C. HALL,

*Petitioner*

*v.*

GEORGIA,

*Respondent*

---

## PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF GEORGIA

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April 27, 1992

## QUESTIONS PRESENTED

1. Whether, in a case in which the prosecution struck all potential black jurors from the jury panel, the trial court should test the sufficiency of the prosecution's explanations for its facially discriminatory conduct by examining whether the articulated grounds were applied comparably to similarly situated blacks and whites.

2. Whether the Georgia Supreme Court adopted an unconstitutionally overbroad and vague interpretation of the Georgia death penalty statute when it relied solely on the "depravity of mind" language of GA. ANN. CODE § 17-10-30(b)(7) (1990) in affirming petitioner's sentence of death.

3. Whether, when state law makes the jury the legally constituted fact finder and when the factual basis for the jury's finding of an aggravating circumstance, permitting imposition of the death penalty, is not upheld, an appellate court may uphold the sentence of death on the ground that the jury could have made the finding on a different factual basis.

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**PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF GEORGIA**

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Petitioner Dennis C. Hall ("Hall") respectfully petitions for a writ of certiorari issue to review the judgment of the Supreme Court of Georgia entered in this case.

## OPINION BELOW

The opinion of the Supreme Court of Georgia is reported at 261 Ga. 778 and is attached in the Appendix ("App.") to this Petition at 13a. No opinion was issued by the trial court.

## JURISDICTION

The Georgia Supreme Court issued its judgment and opinion on December 3, 1991. Petitioner filed a timely motion for reconsideration, which was denied by a divided vote of the Georgia Supreme Court on December 18, 1991. (App. at 3a.) On February 27, 1992, petitioner filed a timely application for an extension of time with the Circuit Justice for the 11th Circuit. On March 2, 1992, Justice Kennedy signed an order granting petitioner up to and including April 26, 1992 to file a petition for a writ of certiorari. A stay of remittitur has been granted by the Supreme Court of Georgia. (App. at 1a.) The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a) (1988).

## STATUTES INVOLVED

The statutes involved in this case, GA. ANN. CODE. §§ 17-10-30 and 17-10-31 (1990), are reproduced in the Appendix at 25a.

## STATEMENT OF THE CASE

On January 7, 1990, a domestic dispute arose between petitioner Dennis C. Hall and his family, which included his wife, his two daughters, and his son, Adrian. Hall, who had been drinking over the course of the day, began quarrelling with his son. The argument became heated, and Hall retrieved his shotgun. The gun was fired once. Adrian was hit in the chest. He collapsed, lost consciousness immediately, and died within minutes.

Hall's wife summoned an ambulance and the police. Before the arrival of emergency services, Hall showed substantial grief, kneeling to kiss his son, telling him that he loved him, and that he was sorry, but also told neighbors that "shit happens" and that he had "learned" his son a lesson. (Tr. at 390, 413-14, 432.) Upon the arrival of the police on the scene, Hall acknowledged responsibility for the shooting, pointed out the location of the shotgun to the

police, and turned himself over to the police without resistance. (Tr. at 445, 456, 516.) At a test conducted at the police station an hour and a half after the shooting, Hall's blood alcohol level registered .32 percent. (Tr. at 543.) Hall, who had no prior felony record, was arraigned in the Superior Court for Barrow County, Georgia on charges of malice murder, felony murder, two counts of cruelty to children, and discharging a firearm near a public road.

Voir dire began on August 27, 1990. Sixty-six potential jurors were questioned on voir dire. The trial court excused four blacks and fourteen whites from the venire for cause, leaving a group consisting of 42 whites and six blacks. The prosecutor used six of his ten peremptory challenges to strike all the remaining potential black jurors. Hall, a black man, objected to the State's facially discriminatory act.

In support of the objection, Hall's counsel contended that the strikes were exercised in a racially discriminatory manner. He argued that the facts amounted to a prima facie showing under *Batson v. Kentucky*, 476 U.S. 79 (1986), and that the prosecutor could not rebut this showing, since some of the potential black jurors possessed substantial indicia of being good prosecution, rather than defense, jurors. (Tr. at 324.) The prosecutor, in turn, stated that he struck the six black jurors for various reasons, which included familiarity with Hall's family and others associated with the defense, relationships with persons who had been convicted of certain crimes, and equivocation about the use of the death penalty. The reasons given by the prosecutor applied equally to several white jurors who were not struck.

As to the last black juror struck, Cathy Simmons, the prosecutor stated that, until that morning, he had not intended to strike her from the jury list, although she knew

Hall's mother and had a cousin whom he had prosecuted. (Tr. at 316-17.) The prosecutor then introduced two witnesses (both members of the sheriff's department) who testified that they had observed Simmons sitting in the row behind Hall's family during jury selection. (Tr. at 317-19.) The prosecutor informed the Court that "[t]hat was the reason I changed my strike this morning . . . ." (Tr. at 319.) Upon questioning, both witnesses readily conceded that they had seen no actual contact between Simmons and the family. (Tr. at 319-20.)

Without explanation or further inquiry, the trial court accepted the prosecutor's proffered explanations for the first five strikes. The Court expressed substantial misgivings about the exercise of the final strike, but, noting that it had not had any trouble with this prosecutor in the past, ruled that the jury was constitutionally constituted. "[A]s I understand [*Batson v. Kentucky*] . . . if he can *articulate* nonracial reasons for the strikes, he's entitled to exercise what used to be a true peremptory strike where you gave no reason." (Tr. at 325) (emphasis added). The Court made no inquiry beyond the representations of the prosecutor and a brief colloquy with the two members of the sheriff's department.

Trial began on August 28 and lasted through the next day. The prosecution offered the taped statement of the defendant, the testimony of the arresting officers, of several of the Halls' neighbors, and of two child welfare workers who opined on the likely effect of the shooting on the victim's two sisters. After the Court denied the defense's motion for a directed verdict, the jury returned guilty verdicts on all counts.

Following brief testimony at the penalty phase, the jury was instructed that it could impose the death penalty only if it made a finding that the aggravating circumstance set

forth at section (b)(7) of the Georgia death penalty statute was present. Specifically, the Court instructed the jury that it could impose the sentence of death only if it found that the murder was outrageously or wantonly vile, horrible or inhuman, and either demonstrated depravity of mind by the defendant or involved torture to the victim prior to death. (Tr. at 1116.) Consistent with standard practice in the Georgia courts, the jury was instructed that depravity of mind could be found only if the defendant committed "torture upon a living person or subjected the body of a deceased victim to mutilation or serious disfigurement." (Tr. at 1119.)

After deliberating, the jury returned the following verdict:

> We, the jury, find the following statutory aggravating circumstances to exist beyond a reasonable doubt: wantonly vile, depravity of mind, horrible, inhuman, and that it involved torture. We find the Defendant, Dennis Charles Hall, be sentenced to death by electrocution.

The defense filed a timely objection on the grounds that the verdict did not conform to the language of the statute. (Tr. at 1134.)

Hall appealed to the Supreme Court of Georgia. In his appeal, Hall identified nineteen sources of error, including the composition of the jury panel and the application of section (b)(7) to the circumstances adduced at trial.

Hall argued, *inter alia*, that the trial court is required to evaluate independently the sufficiency of the prosecutor's grounds for striking black jurors. He pointed out that the reasons offered by the prosecutor for striking the black witnesses were not applied uniformly between blacks and whites and that the trial court failed to test the adequacy of

the prosecutor's explanations. (Brief of Appellant at 15-19.) The Georgia Supreme Court rejected this argument, holding that the prosecutor's explanations had to be only "sufficiently persuasive" to rebut the prima facie case and that the determination of the sufficiency of the showing rests upon a number of different factors, including, in this case, the fact that the victim, as well as the defendant, was black. (App. at 7a.) The Court completely ignored Hall's argument that the prosecutor did not strike whites who possessed the same characteristics cited as reasons for striking blacks.

The Georgia Supreme Court also rejected Hall's claim that the section (b)(7) aggravating circumstance was improperly applied. The Court was badly divided on this question. Four members of the Georgia Supreme Court voted to affirm Hall's death sentence; three voted to reverse it on the section (b)(7) issue.

Writing for himself and one other member of the Court, Justice Smith found that "[t]he jury was authorized to conclude that the defendant's murder of his 10-year-old son was outrageously or wantonly vile, horrible, or inhuman, and that it involved *mental torture and depravity of mind.*" (App. at 13a) (emphasis added). The two concurring justices did not find that there was evidence of mental torture sufficient to support the death sentence. They nonetheless concluded that the death sentence should be upheld based on the uncircumscribed finding of "depravity of mind." "Whether or not the factual circumstances in this case rise to 'torture,' a jury might most assuredly find that the murder by Hall of his minor son in the presence of his minor daughters, along with his conduct immediately following the murder, demonstrated 'depravity of mind.'" (App. at 15a-16a) (Weltner, J. concurring). Thus, although the Georgia Supreme Court narrowly upheld the

jury's finding of depravity of mind, only a two-member minority concluded that there was evidence sufficient under Georgia law to affirm the finding of torture.

Three justices dissented, all agreeing that the evidence did not support a finding of either mental or physical torture. (App. at 16a.) The dissenters observed that the Georgia Supreme Court had previously rejected the notion "that pain and the anticipation of death alone constitute serious physical and psychological abuse before death." (App. at 21a.) The dissent continued:

> Such an interpretation of § (b)(7) would allow the trier of fact to find § (b)(7) in almost every murder case. We cannot so broadly construe "physical" or "psychological" abuse.

*Id.* The dissent also pointed out that in prior cases, the Court had held that "shooting alone, even multiple shots, is not sufficient to show torture." *Id.* The dissent also found that, since there was no evidence of "serious psychological abuse before death," the jury's finding of depravity of mind could not stand. *Id.*

## REASONS FOR GRANTING THE PETITION

### I. THE COURT SHOULD RESOLVE A CONFLICT BETWEEN THE SUPREME COURT OF GEORGIA AND OTHER COURTS CONCERNING THE LEVEL OF INQUIRY A TRIAL COURT MUST UNDERTAKE TO DETERMINE WHETHER PEREMPTORY CHALLENGES WERE THE PRODUCT OF DISCRIMINATORY INTENT.

In *Batson v. Kentucky*, 476 U.S. 79, 89 (1986), this Court ruled unconstitutional the prosecution's racially discriminatory use of peremptory challenges. Under *Batson*, a defendant may make out a prima facie equal protection violation by showing that the prosecutor exercised peremptory challenges against members of the defen-

dant's race. *Id.* at 96. Once a prima facie case is established, the burden shifts to the prosecution to come forward with race-neutral explanations for its strikes. *Id.* at 98. The trial court then has the duty to determine whether the prosecution's facially neutral explanations are genuine or pretextual. *Id.* at 98. This three-part inquiry was recently reaffirmed in *Hernandez v. New York*, ___ U.S. ___, 111 S. Ct. 1859 (1991).

*Batson* and its progeny have left undefined the contours of the trial court's required examination of the prosecutor's explanations. This has led to conflicting opinions in the lower courts. In this case, the Georgia Supreme Court affirmed Hall's conviction despite the fact that the trial court accepted the prosecutor's explanations at face value, without inquiring whether the prosecutor's proffered reasons for striking blacks were comparably applied to whites. In concluding that the trial court's inquiry was adequate, the Georgia Supreme Court finds itself in square conflict with at least two federal courts of appeals and the highest courts of Florida and Maryland -- all of which have required a more searching inquiry.

At the brief hearing conducted by the trial court in this case, Hall made out a prima facie case of racial discrimination: the prosecution used six of its ten strikes to clear the jury venire of all the remaining blacks.[1] The prosecution offered an explanation for each of the six strikes, and presented testimony to prove that one juror, Eva Morrow,

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[1] The State conceded at trial and before the court below that the petitioner established a prima facie case of purposeful discrimination. In any event, once the prosecution has made an attempt to articulate his grounds for its peremptory challenges and the court has ruled on the ultimate question of intentional discrimination, the threshold question of whether a prima facie case was adequately made is rendered moot. *Hernandez*, 111 S. Ct. at 1866.

knew Hall's family. The trial court made further inquiries about only one peremptory challenge and, with regard to that challenge, engaged in only cursory questioning of two witnesses offered by the prosecution. The Court, while still expressing considerable misgivings about the final strike, concluded, "as I understand the ruling [in *Batson*], it's that if he can *articulate* nonracial reasons for the strikes, he's entitled to exercise what used to be a true peremptory strike where you gave no reason." (Tr. at 325) (emphasis added).

On appeal, Hall contended that the trial court erred by not inquiring beyond the facial explanations offered by the prosecution and not analyzing whether they were applied comparably to blacks and whites. The Georgia Supreme Court, however, characterized the trial court's inquiry as consistent with its duties under *Batson*. It ignored Hall's argument that the reasons given by the prosecution for striking black jurors applied equally to white jurors who were not struck. It further found that a court's obligation to test the adequacy of the prosecutor's explanation was reduced by the fact that the victim in this case, as well as the defendant, was black.

In its haste to uphold the conclusory action of the trial court, the Supreme Court of Georgia disregarded the trial court's failure to exercise its duty to inquire whether black and white jurors were treated comparably by the prosecution. In contrast, a significant body of law has evolved in other jurisdictions holding that an inquiry into disparate treatment of similarly situated white and black jurors is a key component in determining whether the prosecution has acted in a race-neutral manner.

Two courts of appeals have indicated that, in the face of a *Batson* challenge, a trial court should examine the prosecutor's facially neutral explanations for striking black

jurors to ensure that they were comparably applied to similarly situated white jurors. *See Walton v. Caspari*, 916 F.2d 1352, 1361-62 (8th Cir. 1990), *cert. denied*, ___ U.S. ___, 111 S. Ct. 1337 (1991); *United States v. Horsley*, 864 F.2d 1543, 1546 (11th Cir. 1989). At least two state courts of last resort have also relied on the importance of this type of review in finding discriminatory use of peremptory challenges. *See Slappy v. State*, 522 So. 2d 18, 22 (Fla.), *cert. denied*, 487 U.S. 1219 (1988); *Stanley v. State*, 542 A.2d 1267, 1281 (Md. 1988). In each of those cases, the reviewing court considered whether the trial court had carefully inquired into the prosecution's motives by examining its treatment of similarly situated white and black jurors. The failure of Georgia's trial and appellate courts to acknowledge the need for this careful inquiry has resulted in widely varying treatment of *Batson* claims between Georgia courts and other jurisdictions.

If *Batson* is to have any force, courts must engage in the sort of comparability analysis absent here: it is simply too easy to disguise the discriminatory purpose for a peremptory strike with some alternative stated purpose. *Slappy*, 522 So. 2d at 20. There exists a broad range of potentially valid reasons a prosecutor may strike a potential juror, ranging from objective tests such as acquaintance with the defendant to more subjective judgments. The prosecution, therefore, will almost always be able to articulate a facially plausible rationale for striking jurors, regardless of whether these reasons reflect the real grounds for the challenge. In addition, findings of trial courts are subject to review only under a clearly erroneous standard. *Hernandez*, 111 S. Ct. at 1870-71. Without specific factual findings related to comparable treatment of similarly situated black and white jurors, the required review of prosecutorial motive cannot be made, either at the trial or the appellate level.

In this case, if the trial court had attempted to compare the prosecutor's actions toward similarly situated black and white jurors, the record would have raised substantial questions about the government's motivations. As the Supreme Court stated in its opinion, the prospective black jurors were struck

> either because they were well acquainted with the defendant and his family, were closely related to persons who had been in trouble with the law, or had expressed a reluctance to impose a death sentence.

(App. at 6a.)

Yet, if these grounds for striking black jurors were genuine, the prosecutor would have struck a number of white jurors who were in fact permitted to sit on the jury. For example, several potential white jurors who were not struck also "were well acquainted with the defendant and his family." Mary T. Brock worked with Hall's wife. (Tr. at 53.) Thomas Burson Maynard and Sanford Schwartz, who served as foreperson for the jury, both knew Hall's mother. (Tr. at 52, 217.) Mr. Schwartz and five other white venire members knew the Eberharts, some of whom were potential defense witnesses. (Tr. at 218-19.) The prosecutor also failed to strike white jurors who "were closely related to persons who had been in trouble with the law." Daniel Dupree Darby, whose brother had been convicted of a crime, and Jerry Davis, who himself had been arrested and charged with burglary, were permitted to remain on the jury. (Tr. at 281-82, 316.) Finally, the prosecutor failed to strike several white jurors who "had expressed a reluctance to impose a death sentence." Jerry A. Davis said that he felt he should not judge others, and Lorene Davis said she was "not really" in favor of the death penalty. (Tr. at 259-61, 294-95.)

The trial court's failure to inquire closely into these issues, and the decision of the Georgia Supreme Court to uphold the sufficiency of the inquiry, amounts to clear error and, moreover, creates a conflict among the states and circuits that can only be resolved by this Court.

## II. THE COURT SHOULD RESOLVE A CONFLICT BETWEEN THE DECISION OF THE GEORGIA SUPREME COURT IN THIS CASE AND THE PRIOR DECISIONS OF THIS COURT AND OF SEVERAL CIRCUITS CONCERNING THE CONSTITUTIONAL APPLICATION OF THE DEPRAVITY OF MIND PROVISION OF THE GEORGIA DEATH PENALTY STATUTE.

Hall is to suffer the death penalty because the Supreme Court of Georgia upheld the jury's finding that the crime of which Hall was convicted involved "depravity of mind." This Court has consistently found that capital punishment may not be imposed unless state law channels the sentencer's discretion to prevent arbitrary imposition of this ultimate penalty, and that broad statutory aggravating circumstances such as "depravity of mind" must be narrowly interpreted to restrict their application to those extraordinary cases in which the death penalty is appropriate. In Hall's case, the Supreme Court of Georgia disregarded its own narrowing construction of the "depravity of mind" language in Georgia's death penalty statute, and affirmed Hall's sentence despite its failure to find that his crime exhibited any of the characteristics that are ordinarily required to support the finding of "depravity." The Supreme Court of Georgia's decision, affirming imposition of the death penalty for an ordinary domestic killing, effects an unconstitutional application of Georgia's death penalty law, which must be reversed.

Under section (b)(7) of the Georgia death penalty statute, the jury, before it may impose a sentence of death,

must find, *first*, that the offense of murder was outrageously vile, horrible, or inhuman, and, *second*, that it involved at least one of the following: torture, depravity of mind, or an aggravated battery to the victim. *See Hance v. State*, 245 Ga. 856, 268 S.E.2d 339, 348, *cert. denied*, 449 U.S. 1067 (1980). In the penalty phase of Hall's trial, the jury was instructed that it could not impose the penalty of death unless it found that the crime involved torture or depravity of mind. (Tr. at 1116-19.) The jury was further instructed that it could not find depravity of mind unless the defendant tortured the victim. (Tr. at 1119.) The jury returned a sentence of death, finding, albeit in a manner not conforming to the language of the statute, torture and depravity of mind.

On review, a majority of the Georgia Supreme Court failed to credit the jury's finding that the petitioner tortured the victim; accordingly, the court's decision upholding the death sentence is premised exclusively on the jury's finding of "depravity of mind."[2] In thus affirming a death sen-

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[2] Under Georgia law, mental torture may support findings of torture or depravity of mind. However, only severe psychological abuse of the victim amounting to prolonged and deliberate infliction of pain and suffering is considered sufficient to warrant imposition of the death penalty. *See Brown v. State*, 247 Ga. 298, 275 S.E.2d 52, 58 ("Evidence of psychological abuse to the victim before death where it is shown to have resulted in severe mental anguish to the victim in anticipation of physical harm, may amount to serious physical abuse (i.e., torture to the victim) and will support a finding of depravity of mind."), *cert. denied*, 454 U.S. 882 (1981).

The evidence of psychological abuse must be adequate to distinguish the crime from most murders. A finding of psychological torture would be justified, for example, "where the victim [is] accosted, taken forcibly to another location, taunted with the prospect of death, and then killed." *Id.*; *see also High v. State*, 247 Ga. 289, 276 S.E.2d 5, 13 (1981), *cert. denied*, 455 U.S. 927 (1982). On the other hand, the

tence based on a finding of depravity of mind in the absence of torture, or any other specific indicia of depravity, the Georgia Supreme Court abandoned its own narrowing construction of section (b)(7) and placed its jurisprudence in square conflict with the case law of this Court and of the courts of appeals of several circuits.

Before this case, in an unbroken line since this Court's decision in *Godfrey v. Georgia*, 446 U.S. 420 (1980), the Georgia courts have interpreted depravity of mind under section (b)(7) to require either (a) aggravated battery or torture of the victim before death or (b) mutilation or sexual abuse of the body after death. Under the model jury instructions recommended by the Georgia Supreme Court, torture or aggravated battery are specific prerequisites to the finding of depravity of mind.[3]

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"mere apprehension of death, immediately before the fatal wounds are inflicted" does not constitute psychological torture. *Phillips v. State*, 250 Ga. 336, 297 S.E.2d 217, 220 (1982) (where defendant accosted his estranged wife at her place of employment and shot her repeatedly, jury finding of torture and depravity of mind overturned); *see also Whittington v. State*, 252 Ga. 168, 313 S.E.2d 73, 82 (1984) ("What § (b)(7) condemns is the 'unnecessary and wanton infliction of pain and suffering,' aside from that resulting as a matter of course from the commission of any murder.").

[3] The model instructions on depravity of mind are as follows:

I charge you that depravity of mind is a reflection of an utterly corrupt, perverted or immoral state of mind. In determining whether or not the offense of murder in this case involved depravity of mind on the part of the defendant, you may consider the age and physical characteristics of the victim and you may consider the actions of the defendant prior to and after the commission of the murder. *In order to find that the offense of murder involved depravity of mind, you must find that the defendant*, as a result of his utter corruption, perversion or immorality, *committed aggravated battery or torture upon a living per-*

In the vast majority of depravity of mind cases, the jury has also made an explicit finding in the penalty phase that there was torture or an aggravated battery to the victim.[4] In rare instances, a Georgia jury has made a finding of depravity of mind without also making a separate finding of torture or aggravated battery. In such cases, the Supreme Court of Georgia has reviewed the record to insure there is evidence of torture or aggravated battery of the victim or mutilation or sexual abuse of the victim's body sufficient to support the finding of depravity.[5]

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*son, or subjected the body of a deceased victim to mutilation, or serious disfigurement or sexual abuse.*

*West v. State*, 252 Ga. 156, 313 S.E.2d 67 (1984) (emphasis added).

[4] *See, e.g., Hall v. State*, 259 Ga. 412, 383 S.E.2d 128, 130 (1989) (defendant stabbed his wife seventeen times, including a series of stab wounds in a pattern about the neck like a necklace), *cert. denied*, ____ U.S. ____, 111 S. Ct. 221 (1990); *Jarrells v. State*, 258 Ga. 833, 375 S.E.2d 842, 844 (defendant stabbed victims with scissors, tied their hands and feet with electrical cord, and beat them with a clothing iron), *cert. denied*, 493 U.S. 874 (1989); *Foster v. State*, 258 Ga. 736, 374 S.E.2d 188, 197 (1988) (victim was beaten with a fireplace log, sexually assaulted with a salad dressing bottle, and strangled to death), *cert. denied*, 490 U.S. 1085 (1989); *Pruitt v. State*, 258 Ga. 583, 373 S.E.2d 192, 195 (1988) (defendant kidnapped five-year-old girl, sodomized and raped her, and beat her with a belt buckle), *cert. denied*, 493 U.S. 1093 (1990).

[5] *See, e.g., Brown v. Francis*, 254 Ga. 83, 326 S.E.2d 735, 736 (victim was psychologically tortured prior to death), *cert. denied*, 474 U.S. 865 (1985); *Strickland v. State*, 247 Ga. 219, 275 S.E.2d 29, 70 (evidence showed that crime was culmination of plan to inflict physical and mental pain and suffering), *cert. denied*, 454 U.S. 882 (1981); *Fair v. State*, 245 Ga. 868, 268 S.E.2d 316, 318 (defendant burned the body of his victim), *cert. denied*, 449 U.S. 986 (1980); *Hance v. State*, 245 Ga. 856, 268 S.E.2d 339 ("A defendant who mutilates or seriously disfigures the victim's body after death . . . or who commits a sex act upon the victim's body after death may be found to have a depraved

In this case, for the first time since *Godfrey*, the Georgia Supreme Court has released the depravity of mind element of the death penalty statute from its definitional moorings. In its decision affirming petitioner's sentence, the court below neither accepted the limiting principles it had previously applied nor articulated a new test. Instead, the concurring opinion merely asserted, in a conclusory fashion, that "a jury might most assuredly find that the murder by Hall of his minor son in the presence of his minor daughters, along with his conduct immediately following the murder, demonstrated 'depravity of mind.'" (App. at 15a-16a.) (Weltner, J., concurring.) The opinion did not identify any specific aspect of the crime which would place it at the "core" of those of crimes which the state has found make the perpetrator eligible for the death penalty.[6] The decision of the Georgia Supreme Court amounts to the creation of a "catchall" category, to which any defendant might arbitrarily be assigned. It also brings the Georgia Supreme Court into square conflict with the decisions of the Supreme Court of the United States and with the decisions of lower courts in other jurisdictions.

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mind"), *cert. denied*, 449 U.S. 1067 (1980); *Brooks v. State*, 244 Ga. 574, 261 S.E.2d 379, 382 (1979) (victim was raped and tortured prior to death).

[6] The concurrence obliquely referred to two facts: the conduct of the petitioner after the shooting and the presence of two minor children at the scene. It cannot be reasonably argued that the apathetic demeanor of the petitioner after the killing or the presence of witnesses is sufficient to distinguish this case from other murder convictions. Indeed, in similar circumstances, the Georgia Supreme Court has reversed a jury finding of depravity of mind. *See Hatcher v. State*, 259 Ga. 274, 379 S.E.2d 775, 778 (1989) (Defendant, after drinking all afternoon, forced his way into former girlfriend's apartment and killed her and her mother, all while the victim's child was hiding in the bathroom.).

a. In affirming petitioner's death sentence solely on the basis of depravity of mind, the Supreme Court of Georgia blatantly disregarded this Court's Eighth Amendment jurisprudence. As this Court has ruled many times, a state's death penalty statute must ensure that capital punishment is not imposed arbitrarily. A capital sentencing scheme must provide a "meaningful basis for distinguishing the few cases in which [the penalty] is imposed from the many cases in which it is not." *Furman v. Georgia*, 408 U.S. 238, 313 (1972). It is a well-established proposition in this Court that when the imposition of the death penalty depends upon the finding of a statutory aggravating circumstance, the aggravating circumstance must be carefully drawn to restrict application of the penalty to a well-defined class of cases.[7]

This Court has long recognized that the section (b)(7) aggravating circumstance of Georgia's death penalty statute may easily be subject to unconstitutionally broad application. As the Court wrote in *Gregg v. Georgia*, 428 U.S. 153 (1976), "any murder [arguably] involves depravity of mind or an aggravated battery." *Id.* at 201.[8] However,

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[7] *See Lewis v. Jeffers*, ____ U.S. ____, 110 S. Ct. 3092, 3099 (1990) ("Aggravating circumstances must be construed to permit the sentencer to make a principled distinction between those who deserve the death penalty and those who do not."); *Zant v. Stephens*, 462 U.S. 862, 877 (1983) ("[A]n aggravating circumstance must genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder.") (footnote omitted).

[8] More recently, the Court recognized that a similar aggravating circumstance in Arizona's death penalty statute was facially vague. *See Walton v. Arizona*, __ U.S. __, 110 S. Ct. 3047, 3057 (1990). The Arizona statute permits the jury to impose a death sentence if they find that "the defendant committed the offense in an especially heinous,

the Supreme Court has upheld the statute based on the expectation, made explicit in *Gregg*, that the Georgia courts would interpret section (b)(7) narrowly:

> But this language need not be construed [broadly], and there is no reason to assume that the Supreme Court of Georgia will adopt such an open-ended construction.

*Id.* In *Gregg*, the Court noted that the Georgia Supreme Court had upheld only one death sentence based on the seventh aggravating circumstance, and that "that homicide was a horrifying torture-murder." *Id.*;[9] *see also Zant v. Stephens*, 456 U.S. 410 (1982).

This limitation on the application of section (b)(7) was reinforced in *Godfrey v. Georgia*, 446 U.S. 420 (1980), a case that bears a striking factual similarity to this one. *Godfrey* was convicted of shooting and killing his wife and mother-in-law in the presence of his twelve-year old daughter.[10] He expressed no remorse, indicating that he had

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cruel, or depraved manner." ARIZ. REV. STAT. ANN. § 13-703(F)(6) (1989). The Court recognized that, without a limiting construction, this aggravating circumstance failed to pass muster under the Eighth Amendment:

> [T]here is no serious argument that Arizona's "especially heinous, cruel, or depraved" aggravating factor is not facially vague.

110 S. Ct. at 3057.

[9] In that case, *McCorquodale v. State*, 233 Ga. 369, 211 S.E.2d 577, 580 (1974), *cert. denied*, 428 U.S. 910 (1976), the defendant "burned the victim on the breasts, the thigh and the navel" before raping and killing her.

[10] The court in *Godfrey* described the crime as follows:

> [T]he petitioner got out his shotgun and walked with it down the hill from his home to the trailer where his mother-in-law lived. Peering through a window, he observed his wife, his mother-in-

waited eight years to kill his wife and would do it again. *Godfrey v. State*, 243 Ga. 302, 253 S.E.2d 710, 714 (1979). The defendant in *Godfrey* was sentenced to death after the jury found that the section (b)(7) aggravating circumstance was present. The jury's application of the section (b)(7) aggravating circumstance was based solely on a finding that the defendant had demonstrated depravity of mind.[11]

The Supreme Court overturned the sentence. The Court found that the sentence was unconstitutional because the petitioner's crimes "[could not] be said to have reflected a consciousness materially more 'depraved' than that of any person guilty of murder." *Godfrey v. Georgia*, 446 U.S. at 432-33. Therefore, there was "no principled way" to distinguish the case from the many cases in which the death penalty was not imposed.

The Court pointed out that the Georgia Supreme Court had, in the past, construed section (b)(7) so that the "de-

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> law, and his 11-year old daughter playing a card game. He pointed the shotgun at his wife through the window and pulled the trigger. The charge from the gun struck his wife in the forehead and killed her instantly. He proceeded into the trailer, striking and injuring his fleeing daughter with the barrel of the gun. He then fired the gun at his mother-in-law, striking her in the head and killing her instantly.

446 U.S. at 425.

[11] The jury did not state this explicitly; it stated only "that the offense of murder was outrageously or wantonly vile, horrible and inhuman." However, depravity of mind was the only one of the three section (b)(7) prongs that the jury could have found to be present. Three times during the course of his argument, the prosecutor in *Godfrey* told the jury that the case involved no allegations of torture or aggravated battery. In addition, the trial court indicated in its sentencing report that the murders did not involve torture. *Godfrey*, 446 U.S. 420, 432.

pravity of mind" encompassed by the statute was "that which results in torture or aggravated battery to the victim."[12] Such a construction, the Court implied, would be constitutional. However, in *Godfrey*, the Georgia Supreme Court had departed from its duty to restrict the death penalty under the statutory aggravating circumstance to "those cases that lie at the core." *Id.* at 429 (quoting *Harris v. State*, 237 Ga. 718, 230 S.E.2d 1, 11 (1976)). As the Court explained later, the *Godfrey* jury "was [not] given a constitutionally limiting definition of the challenged aggravating factor" and the state appellate court did not "purport to affirm the death sentence by applying a limiting definition of the aggravating circumstance to the facts presented." *Walton*, 110 S. Ct. at 3057. With no limiting construction of the aggravating circumstance applied at either the trial or appellate level, the Court ruled that Godfrey's sentence was unconstitutional. This principle has been reaffirmed many times since. *See Maynard v. Cartwright*, 486 U.S. 356, 363-65 (1988); *see also Stringer v. Black*, No. 90-6616, 1992 U.S. LEXIS 1533 (U.S. Mar. 9, 1992).

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[12] The Supreme Court need not dictate a particular definition of depravity of mind. It is necessary only that the state courts adopt some definition of the phrase that narrows the jury's discretion. For example, when it upheld the Arizona death penalty statute, the Court noted with approval that the court had applied an appropriate narrowing construction of the term "depraved":

> [W]e [cannot] fault the state court's statement that a crime is committed in an especially "depraved" manner when the perpetrator "relishes the murder, evidencing debasement or perversion," or "shows an indifference to the suffering of the victim and evidences a sense of pleasure" in the killing.

*Walton v. Arizona*, 110 S. Ct. at 3058 (quoting *State v. Walton*, 769 P.2d 1017, 1033 (Ariz. 1989)).

By abandoning its own narrowing principles and declining to adopt any limiting rules in its place, the court below acted in a manner contrary to *Godfrey* and its progeny. Under the rule set forth in *Hall*, a defendant's eligibility for the death penalty rests on the sentencer's unfettered discretion; there is no limiting principle governing the types of murders the sentencer may find "depraved." The Georgia Supreme Court should not be permitted to ignore with impunity the square precedents of this Court.

b. The Georgia Supreme Court's unfocused application of the "depravity of mind" aggravating circumstance conflicts with the approach of other jurisdictions, which more consistently recognize this Court's refusal to permit the imposition of the death penalty under statutes which do nothing to channel the sentencer's discretion. The Courts of Appeals of several circuits have reversed death sentences imposed under aggravating circumstances similar to that applied to Hall.

For example, in *Moore v. Clark*, 904 F.2d 1226 (1990), *reh'g denied*, 951 F.2d 895 (8th Cir. 1991), the Court reversed the defendant's sentencing under a Nebraska statute that permitted imposition of the death penalty if the defendant "manifested exceptional depravity by ordinary standards of morality and decency." *Id.* at 1228. The sentencing panel had been guided by decisions of the Supreme Court of Nebraska interpreting the aggravating circumstance to mean that the murder was "so coldly calculated as to indicate a state of mind totally and senselessly bereft of regard for human life"; involved "unresisting victims"; and was "exceptional." *Id.* at 1230-31. The Court of Appeals ruled that the Nebraska court had "failed to provide the guidance necessary . . . to cure the constitutional deficiencies of this vaguely worded statute." *Id.*; *see also Newlon v. Armontrout*, 885 F.2d 1328, 1334-35 (8th

Cir. 1989) (reversing defendant's death sentence under Missouri's "depravity of mind" aggravating circumstance), *cert. denied*, __ U.S. __, 110 S.Ct. 3301 (1990).

Similarly, in *Creech v. Arave*, 947 F.2d 873, 883 (9th Cir. 1991), the Ninth Circuit reversed the defendant's death sentence under an Idaho statute when the trial court found as an aggravating circumstance that the defendant exhibited "utter disregard for human life." The court found that the narrowing construction of the statute applied to the defendant was inadequate because it failed to require the sentencer to "make an objective determination of whether specific acts occurred." *Id.* at 884;[13] *see also Deutscher v. Whitley*, 946 F.2d 1443, 1446-47 (9th Cir. 1991) (setting aside death penalty imposed under Nevada law because counsel for defendant failed to object to "depravity of mind" instruction which "failed to provide objective indicia").

Although it has never ruled squarely on the issue, the Eleventh Circuit has expressed discomfort with the possibility that a Georgia jury might impose the death penalty based solely on a finding of depravity of mind, without finding either torture or aggravated battery at the same time:

> [T]he potential subjectivity of the phrase 'depravity of mind' renders a death sentence that is based upon that phrase alone more suspect than one that is based

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[13] The Idaho Supreme Court had stated that the phrase "utter disregard for human life" was "meant to be reflective of acts or circumstances surrounding the crime which exhibit the highest, the utmost, callous disregard for human life, i.e., the cold-blooded, pitiless slayer." *Creech v. Arave*, 947 F.2d at 883 (quoting *State v. Osborn*, 631 P.2d 187, 201 (Idaho 1981)).

> on both 'depravity of mind' and one of the other factors as well.

*Burger v. Zant*, 718 F.2d 979, 982, 984 n.4 (11th Cir. 1983). The Eleventh Circuit has repeatedly intimated that a death sentence based on a jury finding of depravity of mind, without a limiting instruction to require aggravated battery or torture, or some other limiting principle, would violate the Supreme Court's holding in *Godfrey*. In *Stanley v. Zant*, 697 F.2d 955, 971 (11th Cir. 1983), *cert. denied*, 467 U.S. 1219 (1984), the Court upheld the defendant's death sentence because the jury had been instructed that it had to find "torture, depravity of mind, *and* an aggravated battery to the victim." Thus, the jury could not impose punishment unless it "found beyond a reasonable doubt that his depravity of mind resulted in torture to his victim." *Id.* at 972. *See also Davis v. Kemp*, 829 F.2d 1522, 1534 (11th Cir. 1987) ("[T]here is not a possibility here, as there was in *Godfrey*, that 'the jury might find depravity of the mind even absent any serious physical abuse of the victim before death.'") (quoting *Stanley*, 697 F.2d at 971).

These decisions by courts in other jurisdictions, forbidding the imposition of death sentences under overbroad aggravating circumstances, stand in stark contrast to the approach adopted by the Court below, which threw out the limiting basis for the jury's finding of depravity of mind and applied no other narrowing definition to the facially vague aggravating circumstance. The decision affirming Hall's sentence must not be allowed to stand.

## III. THE COURT SHOULD RESOLVE THE CONFLICT BETWEEN THE GEORGIA SUPREME COURT AND THIS COURT AS TO WHETHER AN APPELLATE COURT MAY AFFIRM A DEATH SENTENCE ON GROUNDS THAT WERE NOT RELIED UPON BY THE STATUTORILY CONSTITUTED DECISION MAKER.

The fragile coalition in the Georgia Supreme Court in favor of affirming Hall's sentence mustered a majority only for a finding of depravity of mind. Only two members of the Court concluded that the facts of the case supported the jury's conclusion that there was torture. The other two justices voting for affirmance can have done so only by reevaluating the evidence independently and finding the aggravating circumstance based on a definition of depravity of mind inconsistent with the judge's charge to the jury. This approach violated petitioner's rights to due process secured under the Fourteenth Amendment and conflicted with this Court's holding in *Presnell v. Georgia*, 439 U.S. 14 (1978),[14] and *Hicks v. Oklahoma*, 447 U.S. 343 (1980).

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[14] The discussion in *Cabana v. Bullock* of *Presnell* should not dissuade the Court from following the teachings of *Presnell*. *See Cabana v. Bullock*, 474 U.S. 376, 387 n.4 (1986). *Cabana* and *Spaziano v. Florida*, the case referenced in *Cabana*, should be understood in the context of their facts. Under the state law analyzed in those cases, the trial jury was not solely vested with the discretion to impose the death penalty. In *Spaziano*, the Court held as constitutional the Florida death penalty regime, which allowed a trial court judge to disregard the jury's recommendation of a life sentence and impose the death penalty. *Spaziano v. Florida*, 468 U.S. 447, 464-65 (1984). In *Cabana*, "Bullock had no state-law entitlement at the time of his trial to have the jury (or, indeed, anyone at all)" make the requisite findings. *Cabana*, 474 U.S. at 387 n.4. Here, in contrast, the Georgia regime vested that decision as to the penalty squarely on the jury's shoulders.

Under the trial court's charge, the jury could only have found that petitioner acted with a depraved mind because he committed an act of torture in connection with his crime. *See supra* § II. The majority of the Georgia Supreme Court, however, did not find torture adequate to support a finding of depravity. For the Georgia Supreme Court to have found depravity of mind, it must have relied upon evidence different from that relied upon by the jury in imposing the death penalty. Doing so amounts to an usurpation of the role of the jury in imposing the death penalty under Georgia state law, and a violation of the petitioner's right to due process.

Where, as in Georgia:

> [A] State has provided for the imposition of criminal punishment in the discretion of the trial jury, it is not correct to say that the defendant's interest in the exercise of that discretion is merely a matter of state procedural law. The defendant in such a case has a substantial and legitimate expectation that he will be deprived of his liberty only to the extent determined by the jury in the exercise of its statutory discretion, *and that liberty interest is one that the Fourteenth Amendment preserves against arbitrary deprivation by the State.*

*Hicks*, 447 U.S. at 346 (emphasis added) (citation omitted).

It is uncontroverted that the jury, and the jury alone, in Georgia has the discretion to impose the death penalty upon the finding of one or more of the requisite aggravating circumstances. *See* GA. CODE ANN. §§ 17-10-30, 17-10-31 (App. at 25a, 27a). Indeed, this Court has recognized that, in Georgia, the trial court is bound by the jury's recommended sentence. *Gregg*, 428 U.S. at 166. The Georgia Supreme Court has recognized that it cannot, on review, remedy a faulty finding of an aggravating circum-

stance by the jury. For example, in *Jarrell v. State*, 261 Ga. 880, 413 S.E.2d 710 (1992), the jury failed to state that the defendant's actions were "outrageously or wantonly vile, horrible or inhuman," and therefore failed to find explicitly one of the essential elements of the section (b)(7) aggravating circumstance. *See Jarrell*, 413 S.E.2d at 713. The court reversed the sentence of death. It declined to review the evidence independently to determine whether it could support a finding of section (b)(7) or some other aggravating circumstance.

By affirming petitioner's sentence on a basis different from that found by the jury, the state violated his liberty interest in having the jury, and the jury only, determine whether he should be sentenced to death. This issue is more than one of theoretical rights. A capital defendant shapes his presentation and defenses to the judge and jury based upon assumptions about jury instructions and the rules of play. To alter these rules on appeal constitutes fundamental unfairness and deprives the defendant of the ability to mount an adequate defense.

The facts of this case bear a striking resemblance to *Presnell*. In *Presnell*, the jury convicted the defendant of murder and imposed three death sentences. The jury found that "'[t]he [capital] offense . . . was committed while the offender was engaged in the commission of another capital felony . . . .'"[15] in that the defendant had committed (1) rape as to one victim while murdering another; (2) kidnapping with bodily injury as to one victim while engaged in rape; and (3) murder while committing kidnapping with bodily injury. The Georgia Supreme Court reversed as to the first two death penalties, holding that they were depen-

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[15] *Presnell*, 439 U.S. at 14 (quoting GA. ANN. CODE § 27-2534.1(b)(2)).

dent on the defendant committing forcible rape and that the jury had not convicted defendant of that offense. As to the third death penalty, however, the Georgia court, despite noting that the jury had not made a finding of forcible rape, held that evidence in the record supported the conclusion that the defendant had committed that offense, which in turn justified the jury's finding of kidnapping with bodily injury. *Presnell*, 439 U.S. at 15-16.

This Court reversed, holding that the state court had violated one of the fundamental principles of procedural fairness: "'It is as much a violation of due process to send an accused to prison following conviction of a charge on which he was never tried as it would be to convict him upon a charge that was never made . . . . To conform to due process of law, petitioners were entitled to have the validity of their convictions appraised on consideration of the case as it was tried and as the issues were determined in the trial court.'" *Id.* at 16 (quoting *Cole v. Arkansas*, 333 U.S. 196, 201-02 (1948)). The Court continued, "[t]hese fundamental principles of procedural fairness apply with no less force at the penalty phase of a trial in a capital case than they do in the guilt-determining phase of any criminal trial." *Id.*

Here, as in *Presnell*, the state court, while acting on an apparent presumption that the sentence imposed by the jury should stand, invalidated the basis for the jury's determination and determined that Hall had acted with depravity of mind for entirely different reasons. This action by the Georgia court conflicts with this Court's decisions and forms a sound basis for the exercise of discretionary jurisdiction here.

## CONCLUSION

For the reasons set forth above, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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April 26, 1992

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S91P0865

**SUPREME COURT OF GEORGIA**

ATLANTA MARCH 18, 1992

The Honorable Supreme Court
met pursuant to adjournment.

The following order was passed:

BY: Clarke, C.J.

The following direction was given:

DENNIS CHARLES HALL *v.* THE STATE

Upon consideration of the motion for a stay of this court's remittitur in order that an appeal or an application for certiorari may be filed in the Supreme Court of the United States to obtain a review of this court's judgment rendered in this case on Dec. 18, 1991, such motion is hereby granted, subject to the following conditions:

(1) The clerk of this court is directed to withhold the transmittal of such remittitur to the trial court for ninety days from the date of this court's judgment.

(2) The clerk of this court is directed to transmit such remittitur to the trial court not later than the ninety-fifth day from the date of this court's judgment, provided that the clerk shall continue to withhold the transmittal of such

remittitur if the clerk is notified in writing that an appeal or application for certiorari has been timely filed in the Supreme Court of the United States. Upon the timely filing of such appeal or application in the Supreme Court of the United States, the clerk is directed to withhold the transmittal of such remittitur until the final disposition of the case by that court.

/s/ Harold G. Clark
Chief Justice Harold G. Clarke

**SUPREME COURT OF GEORGIA**

ATLANTA DECEMBER 18, 1991

The Honorable Supreme Court
met pursuant to adjournment.

The following order was passed:

Case No. S91PO865

**DENNIS CHARLES HALL *v.* THE STATE**

Upon consideration of the Motion for Reconsideration filed in this case, it is ordered that it be hereby denied.

All the Justices concur, except Benham and Fletcher, JJ., who dissent.

SUPREME COURT OF THE STATE OF GEORGIA
Clerk's Office, Atlanta

I certify that the above is a true extract from the minutes of the Supreme Court of Georgia.

Witness my signature and the seal of said court affixed the day and year last above written.

Joline B. Williams, Clerk.

**IN THE SUPREME COURT OF THE STATE OF GEORGIA**

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S91P0865

HALL

*v.*

THE STATE

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SMITH, Presiding Justice.

The appellant, Dennis Hall, was convicted by a jury in Barrow County of the murder of his ten-year-old son Adrian, of two counts of cruelty to children, and of discharging a firearm near a public street. He was sentenced to death for the murder. He appeals. We affirm.

1. During his marriage, Hall's alcohol abuse and abusive behavior towards his wife and three children resulted in numerous occasions in which the police were called to restore order to the household. Hall once locked his family out of the house when the outside temperature was below freezing. On another occasion, his wife told police that Hall had struck her in the head with a pistol. He also once threatened to shoot his wife and fired a shot into the

air. On none of these occasions, however, did she press charges.

On Sunday, January 7, 1990, Hall began drinking early in the morning and drank throughout the day. As Hall watched television that afternoon, his son Adrian played with a toy remote-controlled tractor. Hall told Adrian to stop, because the toy was interfering with his television reception. When Adrian did not cease playing immediately, Hall went to the boy and struck him in the head. This precipitated an argument between Hall and his wife concerning the necessity for the severity of Hall's punishment. Hall responded by searching for his shotgun. His older daughter took the shotgun outside and hid it in the car. Meanwhile, Adrian got the pistol and took it outside. Hall found the shotgun and loaded it while his wife tried unsuccessfully to take it from him. He approached Adrian, who stood 10 to 15 feet away saying, "Don't shoot me, don't shoot me." Hall shot him in the chest as his wife, two daughters and his next door neighbors looked on. Hall went home, but returned a few minutes later to Adrian's body. Hall kissed his deceased son and told him he loved him. When his neighbor suggested it was "a little too late for that, you've done killed him," Hall responded, "Shit happens," and bragged, "I couldn't learn him nothing by beating him with a belt, so I guess I learned him something this time."

A test administered later that afternoon showed that Hall had a blood alcohol level of .32 grams percent. All who observed Hall that afternoon, however, testified that he was not overly intoxicated, was steady on his feet, and had only slightly slurred speech.

In a post-arrest statement to police, Hall claimed he shot his son in self-defense. Later, he claimed it was an accident.

The evidence supports the conviction for murder. *Jackson v. Virginia*, 443 U. S. 307 (99 SC 2781, 61 LE2d 560) (1979).

2. In his first enumeration of error, Hall, who is black, raises an issue under *Batson v. Kentucky*, 476 U. S. 79 (106 SC 1712, 90 LE2d 69) (1986), concerning the prosecutor's exercise of peremptory challenges. Noting that the prosecutor used six of his ten peremptory challenges to strike all six black prospective jurors on the qualified venire, Hall argues he has established a prima facie case of purposeful discrimination in the selection of his jury. See *Batson*, supra at 96. The state concedes this much (state's brief at p. 14), but contends it successfully rebutted the prima facie case by articulating race-neutral reasons for striking as it did.

After listening to the prosecutor's explanation of his peremptory challenges, the trial court stated that it was concerned only with the prosecutor's final peremptory strike. The other jurors were struck either because they were well acquainted with the defendant and his family, were closely related to persons who had been in trouble with the law, or had expressed a reluctance to impose a death sentence. See *Foster v. State*, 258 Ga. 736 (2) (374 SE2d 188) (1988). The final black juror struck by the prosecutor knew the defendant's mother. Moreover, the prosecutor had prosecuted her cousin. Nevertheless, the prosecutor explained that he had planned to save his last strike for a white prospective juror who had once been arrested on a "bad rap" and had "bad feelings" toward the judicial system. However, on the morning of the jury selection, the last black juror entered the courtroom with the defendant's family and sat immediately behind the defendant's mother. The prosecutor stated that when he

learned of this, he decided to exercise his last peremptory strike against the juror.

(a) The defendant, noting that no one observed the juror actually talking to the defendant's family, contends the prosecutor's explanation was insufficient to support his final strike. However, as we have explained, the prosecutor's explanation 'need not rise to the level justifying exercise of a challenge for cause.' *Gamble v. State*, 257 Ga. 325, 327 (357 SE2d 792) (1987) (quoting from *Batson*, supra). A reasonable suspicion about a prospective juror's impartiality that falls short of justifying an excusal for cause might well justify the exercise of a peremptory strike. This is such a case. That the prospective juror entered the courtroom with the defendant's family and sat next to them might have been mere coincidence, but there was at least some reasonable likelihood that it was not. We cannot condemn the prosecutor's reluctance to gamble on the significance of this occurrence.

(b) Pointing to the trial court's explanation that if the prosecutor could "articulate nonracial reasons for the strikes, he's entitled to exercise" them, the defendant contends the trial court failed independently to evaluate the prosecutor's explanations for his peremptory strikes.

Of course, the trial court may not simply give "rubber stamp" approval to "all nonracial explanations, no matter how whimsical or fanciful." *Gamble v. State*, supra at 327. The explanations must be sufficiently persuasive to rebut the prima facie case. But we do not read the trial court's extemporaneous remarks so parsimoniously as does the defendant. The record as a whole demonstrates the trial court's understanding of its role under *Batson*.

(c) As we noted in *Gamble*, supra:

> A court charged with the duty of determining whether the prosecutor has rebutted a prima facie case may be less troubled by one relatively weak explanation for striking a black juror when all the remaining explanations are persuasive than where several of the prosecutor's proffered justifications are questionable. Similarly, a weak prima facie case may be rebutted more readily than a strong one. [Id. at 327.]

In contrast to the *Gamble* case, where the defendant was black and the victim was white, here both the defendant and the victim were black. Moreover, unlike the *Gamble* case where several explanations were suspect, here the trial court was concerned about the sufficiency of only one of the proffered explanations. The trial court in this case was authorized to conclude that the prosecutor had successfully rebutted the prima facie case.

3. There was no error, as the defendant contends, in the pre-trial excusal of four prospective jurors who were college students enrolled in schools outside the county. The trial judge specifically authorized these excusals for "other good cause" under OCGA § 15-12-1 (a). (Their service was deferred to a later term. Ibid.) *Hendrick v. State*, 257 Ga. 17 (2) (354 SE2d 433) (1987).

4. There was no improper restriction of the death-qualification voir dire. It is not "permissible to ask a juror to describe the *kind* of case that, in the juror's opinion, would warrant a death sentence." (Emphasis in original.) *Blankenship v. State*, 258 Ga. 43,45 (6) (365 SE2d 265) (1988).

5. The defendant next contends the trial court should have granted his motion to excuse for cause a prospective juror who admitted having an opinion about the defendant's guilt. The juror, however, testified that he could set aside this opinion, accord the defendant his presumption of inno-

cence and decide the case on the evidence presented at trial. The trial court found that the juror was qualified. This finding is not clearly erroneous. *Spivey v. State*, 253 Ga. 187, 196-197 (319 SE2d 420) (1984); *Waters v. State*, 248 Ga. 355, 362 (2) (283 SE2d 238) (1981).

6. Previous difficulties between the defendant and his family were properly admitted to show the defendant's bent of mind towards the victim. *Wright v. State*, 184 Ga. 62 (8) (190 SE 663) (1937).

7. In his 6th and 7th enumerations of error, Hall (a) complains of the admission of testimony by two social workers about the possible effects on the defendant's two surviving children who witnessed the murder of their brother by their father, and (b) contends that the evidence is not sufficient to support his conviction on two counts of cruelty to children.

(a) The evidence is undisputed that the defendant's two surviving children were present and witnessed their only brother being murdered by their father. The two children, however, do not presently exhibit overt manifestations of having been traumatized by the event. In fact, according to defense testimony, they showed great affection for their father when he appeared at the victim's funeral (in the custody of law enforcement officers).

The first social worker testified that she is a caseworker with the Barrow County Department of Family & Children's Services. In her 16 years of service, she has worked with several hundred victims of abuse and trauma, including children who have witnessed siblings being seriously injured or killed. She testified that many such children repress such experiences and show no immediate outward signs of trauma, but that it often emerges years later.

The second witness is a licensed clinical social worker and therapist. She testified that she would expect unconscious denial from a young child who witnessed the murder of a sibling, with no outward symptoms until the child was older.

Hall argues that the testimony was irrelevant because it described possible future trauma and not what the children experienced on the date of the murder and was otherwise inadmissible because the witnesses were not experts, and their testimony was speculation.

An expert witness is one who from education, training or experience has peculiar knowledge concerning some matter of science or skill to which his testimony relates. The qualifications of an expert are addressed to the sound discretion of the trial court. *Taylor v. State*, 261 Ga. 287, 290 (13 a) (404 SE2d 255) (1991). Expert testimony is admissible where the conclusion of the expert is one which jurors would not ordinarily be able to draw for themselves and where such testimony would be helpful or necessary to assist the jury. *Jones v. State*, 232 Ga. 762, 764-765 (2) (208 SE2d 850) (1974).

The defendant was charged with "maliciously caus-[ing]. . . cruel and excessive mental pain" to his two daughters (three and seven years old, respectively). See OCGA § 16-5-70 (b). The expert testimony was not offered by the state to establish conclusively that the two children had suffered cruel and excessive mental pain, but to counter the anticipated defense contention that, because they exhibited no overt manifestations of trauma, they had not experienced cruel and excessive mental pain. The expert testimony was properly admitted by the trial court.

(b) The jury was entitled to conclude beyond a reasonable doubt that the defendant's two daughters suffered "cruel and excessive mental pain" when they watched their

father murder their only brother. OCGA § 16-5-70 (b). Moreover, the jury was entitled to conclude that the defendant maliciously caused this pain by wantonly and wilfully shooting his son "with an awareness of a plain and strong likelihood that such harm may result." *Rigenstrup v. State*, 197 Ga. App. 176, 180 (4) (398 SE2d 25) (1990). The evidence supports the jury's verdict on the two counts of cruelty to children. *Jackson v. Virginia*, 443 U. S. 307 (99 SC 2781,61 LE2d 560) (1979).

8. In the circumstances of this case, the defendant was not entitled to an instruction on either grade of involuntary manslaughter, OCGA § 16-5-3, or on accident. *Binns v. State*, 258 Ga. 23 (2) (364 SE2d 871) (1988); *Flanders v. State*, 188 Ga. App. 98 (2) (371 SE2d 918) (1988). *Beck v. Alabama*, 447 U. S. 625 (100 SC 2382,65 LE2d 392) (1980), does not, as the defendant contends, mandate instructions on lesser offenses not supported by the evidence. *Hopper v. Evans*, 456 U. S. 605 (102 SC 2049, 72 LE2d 367) (1982).

9. The court's instructions concerning inferred intent were not erroneous. *Isaacs v. State*, 259 Ga. 717 (35 B) (386 SE2d 316) (1989).

10. The defendant argues the state should have been compelled to disclose the criminal records of its witnesses. The state claims it is not aware of any such convictions. The trial court did not err by refusing to compel the disclosure of that which apparently does not exist. Compare *Isaacs v. State*, supra at 723-724 (11).

11. The § b (7) aggravating circumstance authorizes the death penalty where the offense of murder is "outrageously or wantonly vile, horrible, or inhuman in that it involved torture, depravity of mind, or an aggravated battery." OCGA § 17-10-30 (b) (7). This circumstance has two parts. First, the murder must be "outrageously or wanton-

ly vile, horrible or inhuman." These are words of common understanding having essentially the same meaning and are intended to help distinguish non-capital murders from those in which a death sentence may be appropriate. *Hance v. State*, 245 Ga. 856,861 (268 SE2d 339) (1980). Second, the offense of murder must involve either torture, depravity of mind, or an aggravated battery to the victim (or a combination of these three elements). Id. Accord *West v. State*, 252 Ga. 156, 161 (Appendix) (313 SE2d 67) (1984).

The jury returned this verdict:

> We the jury find the following statutory aggravating circumstances to exist beyond a reasonable doubt: wantonly vile, depravity of mind, horrible, inhuman in that it involved torture.

The defendant contends this verdict is not a valid finding of the § b (7) circumstance. We disagree. Although the verdict's word order does not track the statute exactly, the verdict includes all the essential elements of the § b (7) circumstance and all the findings necessary to sustain a § b (7) finding. *West v. State*, supra. The jury's intent is shown with the requisite clarity. *Page v. State*, 256 Ga. 191, 194 (345 SE2d 600) (1986).

The defendant further contends the evidence is not sufficient to support the jury's § b (7) finding. Again, we disagree. The evidence, viewed in the light most favorable to the jury's verdict, shows a continuing pattern of abuse of the victim by this defendant, culminating in the death of the victim because he was playing with a toy. The defendant chased down and shot his ten-year-old son as the boy begged him not to shoot him. Afterwards, he first dismissed the significance of his act by claiming, "shit happens," then sought to justify the act first as a lesson in discipline, and than as an act of self-defense. The jury was

authorized to conclude that the defendant's murder of his ten-year-old son was outrageously or wantonly vile, horrible or inhuman, and that it involved mental torture and depravity of mind. *Hance v. State*, supra; *Rivers v. State*, 250 Ga. 303 (298 SE2d 1) (1982).

12. Since the defendant's conviction on two counts of cruelty to children was supported by the evidence, see Division 7 (b), post, the jury was authorized to consider these offenses in aggravation. OCGA § 17-10-2.

13. The written instructions furnished by the court to the jury were sufficient. *Mulligan v. State*, 245 Ga. 266 (4) (264 SE2d 204) (1980).

14. The defendant did not object at trial to the state's attempt to impeach a witness, and the issue raised in his 16th enumeration of error has not been preserved for review. *Spencer v. State*, 260 Ga. 640 (7) (398 SE2d 179) (1990).

15. Neither did the defendant object to the state's closing argument. Absent fundamental unfairness, the issues raised in the defendant's 17th enumeration are not preserved for review. Id.; UAP, § IV (A) (3).

16. The trial court committed no abuse of discretion by denying the defendant's motion for a mistrial on the grounds of a deadlocked jury when the jury had been deliberating for only three hours. *Romine v. State*, 256 Ga. 521 (1) (350 SE2d 446) (1986).

17. As noted above, the evidence supports the jury's § b (7) finding. OCGA § 17-10-35 (c) (2). We do not find that Hall's death sentence was imposed as the result of passion, prejudice or other arbitrary factor. OCGA § 17-10-35 (c) (1). Hall's death sentence is neither excessive nor disproportionate to penalties imposed in similar cases, considering both the crime and the defendant. OCGA

§ 17-10-35 (c) (3). The similar cases listed in the Appendix support the imposition of a death sentence in this case.

Judgment affirmed. All the Justices concur, except Weltner and Hunt, JJ., who concur specially as to Division 11; Bell, Benham and Fletcher, JJ., who dissent as to Division 11 and the death sentence; Weltner, Benham and Fletcher, JJ., who dissent as to Division 7 and the conviction on two counts of cruelty to children.

## APPENDIX

*Alderman v. State*, 254 Ga. 206 (327 SE2d 168) (1985); *Conner v. State*, 251 Ga. 113 (303 SE2d 266) (1983); *Smith v. State*, 249 Ga. 228 (290 SE2d 43) (1982); *Krier v. State*, 249 Ga. 80 (287 SE2d 531) (1982); *Cunningham v. State*, 248 Ga. 558 (284 SE2d 390) (1981); *Brown v. State*, 247 Ga. 298 (275 SE2d 52) (1981); *High v. State*, 247 Ga. 289 (276 SE2d 5) (1981); *Strickland v. State*, 247 Ga. 219 (275 SE2d 29) (1981); *Tyler v. State*, 247 Ga. 119 (274 SE2d 549) (1981); *Cape v. State*, 246 Ga. 520 (272 SE2d 487) (1980); *Thomas v. State*, 245 Ga. 688 (266 SE2d 499) (1980); *Hardy v. State*, 245 Ga. 272 (264 SE2d 209) (1980); *Hamilton v. State*, 244 Ga. 145 (259 SE2d 81) (1979); *Bowen v. State*, 244 Ga. 495 (260 SE2d 855) (1979); *Johnson v. State*, 242 Ga. 649 (250 SE2d 394) (1978); *Alderman v. State*, 241 Ga. 496 (246 SE2d 642) (1978); *Morgan v. State*, 241 Ga. 485 (246 SE2d 198) (1978); *Blake v. State*, 239 Ga. 292 (236 SE2d 637) (1977); *Dix v. State*, 238 Ga. 209 (232 SE2d 47) (1977); *Harris v. State*, 237 Ga. 718 (230 SE2d 1) (1976).

WELTNER, Justice, concurring specially.

I concur in affirming the imposition of the death penalty in this case, but on a basis differing from the majority.

1. OCGA § 17-10-30 (b) (7) defines as one of several "aggravating circumstances:" "the offense of murder . . . was outrageously or wantonly vile, horrible, *or* inhuman *in that* it involved torture, depravity of mind, or an aggravated battery to the victim. . . ." [Emphasis supplied.]

2. An analysis of the statute demonstrates the necessity for the fact finder to make two separate inquiries.

(a) The first inquiry concerns the existence of a factual element, i.e., whether or not the evidence establishes that the murder involved (1) torture, *or* (2) depravity of mind, *or* (3) an aggravated battery to the victim.

(b) The second inquiry (if the jury determines that the murder did involve at least one of these three factual elements) concerns the attributes of the murder, i.e, whether (by virtue of the existence of one or more of the three specified factual elements) the murder was (1) outrageously or wantonly vile, *or* (2) horrible, *or* (3) inhuman.

3. The majority and the dissent are at odds over whether or not the evidence was sufficient to establish "torture." That issue is not essential to the resolution of this case, however, in view of the jury's verdict.[1]

(a) The jury found *two* of the three possible factual elements and *three* of the attributes, as specified in OCGA § 17-10-30 (b) (7).

(b) Whether or not the factual circumstances in this case rise to "torture," a jury most assuredly might find that the murder by Hall of his minor son in the presence of his

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[1] "We the jury find the following aggravating circumstances to exist beyond a reasonable doubt: wantonly vile, depravity of mind, horrible, inhuman in that it involved torture." Id. at p. 783.

minor daughters, along with his conduct immediately following the murder, demonstrated "depravity of mind."[2]

I am authorized to state that Justice Hunt joins this special concurrence.

BENHAM, Justice, dissenting.

My review of this case has convinced me that the evidence adduced at trial was insufficient to support the imposition of the death penalty or to support appellant's convictions for cruelty to children. I must, therefore, respectfully dissent to Divisions 7 and 11 of the majority opinion and the judgment insofar as it affirms the death penalty and the convictions for cruelty to children.

1. The aggravating circumstance on which the State relied in seeking the death penalty was that found in OCGA § 17-10-30 (b) (7), that the murder was "outrageously or wantonly vile, horrible or inhuman in that it involves torture, depravity of mind or an aggravated battery." The State conceded that no aggravated battery was involved, and the jury was only charged on the other two elements, torture and depravity of mind.

There is no question that appellant's conduct in this matter was abhorrent and is justly condemned. However, terrible as it was, the evidence in this case does not establish that his conduct was so "outrageously or wantonly vile, horrible or inhuman" as to distinguish this killing from "ordinary murders for which the penalty of death is

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[2] See *Conklin v. State*, 254 Ga. 558, 564-565 (331 SE2d 532) (1985). Compare *West v. State*, 252 Ga. 156, 161-162 and concurring opinion at 163 (313 SE2d 67) (1984). See also *Zant v. Stephens*, 250 Ga. 97, 100 (297 SE2d 1) (1982).

not appropriate. . . ." *Hance v. State*, 245 Ga. 856 (3) (268 SE2d 339) (1980).

To illustrate the difference between this case and those in which the death penalty has been judged to be appropriate under § (b) (7), it is instructive to review the cases cited in the Appendix to the majority opinion. *Alderman v. State*, 254 Ga. 206 (327 SE2d 168) (1985), is a later appearance of *Alderman v. State*, 241 Ga. 496 (246 SE2d 642) (1978), also cited in the Appendix. There, the evidence showed that the defendant developed a scheme to kill his wife and to share the proceeds of her life insurance with another. After forcing his accomplice to strike the victim on the head with a large wrench, the defendant and the accomplice strangled the victim, then held her under water in the bathtub. In *Conner v. State*, 251 Ga. 113 (303 SE2d 266) (1983), the defendant chased the victim into a barbed wire fence, dragged the victim back to a ditch where he beat the victim with a whiskey bottle and a stick, then stomped the victim with his feet before leaving the victim lying in water in the ditch. The defendant in *Smith v. State*, 249 Ga. 228 (290 SE2d 43) (1982), stabbed the victim 17 times and hit him in the head with a hammer, after which the victim lived for almost a full day. This court took note in its review of the aggravating circumstances that this was not a domestic murder. The victim in *Krier v. State*, 249 Ga. 80 (287 SE2d 531) (1982), was subjected to a serious, vicious beating with a telephone receiver, then cut at least 12 times, producing near decapitation. This court noted in *Cunningham v. State*, 248 Ga. 558 (284 SE2d 390) (1981), that the victim was not killed instantaneously, but was beaten with a large wrench, breaking both forearms and producing eight skull fractures. As in *Smith*, supra, it was noted that this was not a domestic murder. *Brown v. State*, 247 Ga. 298 (275 SE2d 52)

(1981), and *High v. State*, 247 Ga. 289 (276 SE2d 5) (1981), were the appeals of two defendants in the same case. They kidnapped the young victim and his stepfather during a robbery, taunted the boy with his impending death on the way to the execution site, then forced him to lie on the ground next to his stepfather, where both victims were killed. This court took note of the deliberate and prolonged psychological torture to which the boy was subjected during the drive. The murder for which the defendant in *Strickland v. State*, 247 Ga. 219 (275 SE2d 29) (1981), was sentenced to death was one of three killings in a single shooting spree. The defendant killed three members of his former girl friend's family, wounded two others, and shot his former girl friend 12 times in an apparent attempt to render her unattractive to others. In the first killing in the spree, the defendant shot the former girl friend's sister in the face four or five times with hollow point bullets, making the crime gruesome in order to punish his former girl friend. In *Tyler v. State*, 247 Ga. 119 (274 SE2d 549) (1981), the defendant killed her husband by poisoning him with rat poison containing the chemical parathion. The actual killing was the culmination of a month-long effort in which the defendant caused the victim agonizing pain in the course of three poisonings. The victim in *Cape v. State*, 246 Ga. 520 (272 SE2d 487) (1980), was a 15-year-old female whose body showed signs of serious sexual abuse and exhibited multiple skull fractures from a beating with an iron pipe. This court noted again that this was not a domestic murder. "[T]orture of the most sadistic kind . . ." was this court's characterization of the brutal strangulation of a nine-year-old boy in *Thomas v. State*, 245 Ga. 688 (266 SE2d 499) (1980). Evidence of blood on the front of the defendant's pants on the day of the murder, coupled with his prior record of child molestation and the fact that the victim's pants had been pulled down,

suggested that the victim was also subjected to a violent sexual assault. The evidence in *Hardy v. State*, 245 Ga. 272 (264 SE2d 209) (1980), showed that the victim was beaten, partially disrobed, cut with a knife, and threatened with immolation in an effort to get him to reveal where his money was kept. After that torture, the victim was methodically executed. The rape of a 13-year-old girl and her subsequent killing by means of multiple stabbings was found to satisfy the aggravating circumstance in *Bowen v. State*, 244 Ga. 495 (260 SE2d 855) (1979). The victim in *Hamilton v. State*, 244 Ga. 145 (259 SE2d 81) (1979), was beaten with a blunt object, then stabbed four times, three times in the head and once in the heart. In *Johnson v. State*, 242 Ga. 649(250 SE2d 394) (1978), the defendant committed an execution-style killing of a young woman whom he had abducted at gunpoint, bound, disrobed, and raped. The defendant in *Morgan v. State*, 241 Ga. 485(246 SE2d 198) (1978), also kidnapped the victim at gunpoint, then transported him to a deserted spot in the trunk of a car, robbed him, blindfolded him, and then killed him with a shotgun blast to his face. After an argument with his girl friend, the defendant in *Blake v. State*, 239 Ga. 292 (236 SE2d 637) (1977), went to the girl friend's house and abducted the girl friend's two-year-old daughter. For revenge against the child's mother, the defendant took her to a bridge and dropped her from a place 100 feet above water, causing "severe mechanical trauma . . . and damage to the internal organs," and killing the child. The evidence in *Dix v. State*, 238 Ga. 209 (232 SE2d 47) (1977), showed that the victim was struck in the face with a blunt instrument, had her mouth taped shut, was tortured with one or more knives, receiving at least 11 cuts, and was then strangled with such force as to cause facial hemorrhaging. Finally, the defendant in *Harris v. State*, 237 Ga. 718(230 SE2d 1) (1976), abducted a strang-

er, forced her at gunpoint to drive to a relatively private part of the shopping center parking lot where he abducted her, then put a coat over her head and shot her twice, all because she reminded him of his stepmother whom he hated.

The cited cases demonstrate a commonality of horror, a sustained brutality or complete indifference to the pain and even the lives of others, without even the motivating force of anger to explain, though not excuse, the cruelty of the defendants' conduct. The present case does not belong in that company. What the evidence in this case shows is that the defendant, after consuming alcohol for an extended period of time, became angered at what he perceived as his son's disobedience, took up his shotgun, walked up to the boy and, without a further word, fired a single fatal shot. By contrast with the cited cases, there was no torture, either physical or mental, over an extended period, no mutilation, no sexual abuse. There was, as has become woefully common, only an angry domestic confrontation ending in a fatal shooting.

Recognizing that the § (b) (7) aggravating circumstance might be abused, this court cautioned in *Harris v. State*, 237 Ga. at 732, that it had

> no intention of permitting this statutory aggravating circumstance to become a "catch all" for cases simply because no other statutory aggravating circumstance is raised by the evidence.

In the present case, the jury indicated that it had found the necessary components of torture and depravity of mind. Those elements were also found by the fact finder in *Phillips v. State*, 250 Ga. 336 (297 SE2d 217) (1982), but this court found the evidence there insufficient to support those findings. There, as here, there were none of the elements of serious physical, sexual or psychological abuse before

death which establish torture, and there was no evidence in either case that the victim was "subjected to serious psychological abuse before death, or to mutilation, serious disfigurement, or sexual abuse after death" (id.) which would establish depravity of mind. The court rejected the notion that pain and the anticipation of death alone constitute

> serious physical and psychological abuse before death. Such an interpretation of § (b) (7) would allow the trier of fact to find § (b) (7) in almost every murder case. We cannot so broadly construe "physical" or "psychological" abuse. [Id.]

This court clearly held in *Phillips* that the mere apprehension of death, immediately before the fatal wound is inflicted, does not amount to serious psychological abuse before death, and that shooting alone, even multiple shots, is not sufficient to show torture. In concluding the sentence review in *Phillips*, this court made an observation equally applicable to the present case:

> The evidence in this case is undeniably sufficient to demonstrate that a murder was committed. For this heinous offense, [Hall] must be punished. [I] cannot agree, however, that this murder was "outrageously and wantonly vile, horrible and inhuman in that it involved torture to the victim and depravity of mind on the part of the defendant." [Id. at 342.]

Also applicable to this case is the following observation from my dissent in *Wade v. State*, 261 Ga. 105, 111 (401 SE2d 701) (1991):

> A life has been taken. When such a loss has resulted from a criminal act, society is justifiably outraged, and when the death involves one of tender years, society's outrage is magnified. In affirming the

> conviction of a defendant charged with a death-producing, act, this court reaffirms society's outrage. However, our obligation as a court goes beyond expressing outrage. Our duty also imposes upon us an obligation to assure that the substantive rules of law and of criminal procedure are observed. It is in pursuit of that duty that I must respectfully dissent to the [affirmance of the death penalty in the] majority opinion.

2. Appellant's conviction for cruelty to children was based solely on the fact that his two daughters were present and saw him murder his son. It is apparent, therefore, that the applicable part of the definition of the offense is in subsection (b) of OCGA § 16-5-70: "Any person commits the offense of cruelty to children when he maliciously causes a child under the age of 18 cruel or excessive physical or mental pain." There being no issue of physical pain in this case, we need be concerned only with evidence of mental pain. Neither of the children nor appellant's wife testified concerning any pain suffered by the murder victim's sisters. The only witnesses on the issue, as noted by the majority, were two social workers. One of those witnesses, who saw the children three days after their brother's death, testified that they exhibited no signs of trauma resulting from the violence in their home. That witness, and another social worker who never interviewed the children at all, testified that many children who have witnessed such events exhibit no signs of trauma immediately, but it may emerge years later. They did not testify, however, that these children suffered pain or that they would certainly do so in the future. As the majority notes, the testimony of these witnesses was not offered to establish that the two children had suffered cruel and excessive mental pain, but to counter an expected defense strategy. The only evidence, then, which was pertinent to the alleged suffering

of those children from the conduct of their father was the defense testimony that the children showed great affection to their father at their brother's funeral.

The majority's holding in this case sets a dangerous precedent. It stands for the proposition that violent crime committed in the presence of a child constitutes cruel treatment of that child even if the conduct involved is in no way aimed at that child. It is apparent from the language of the statute that the legislature intended to protect children from cruel conduct directed at them. The conduct in this case was not directed at appellant's daughters; they were not victims but bystanders.

The majority's interpretation of OCGA § 16-5-70 (b) in this case is overbroad. The statute was not enacted for the protection of witnesses to crime, but for the protection of victims. While appellant's conduct was itself abhorrent, and was exacerbated by his indifference to the possible impact of that conduct on others than the murder victim, the fact that the conduct occurred in the presence of children did not constitute a separate crime. I must, therefore, dissent also to the affirmance of appellant's convictions for cruelty to children.

I am authorized to state that Justice Fletcher joins in this dissent, and that Justice Bell joins in Division 1 of this dissent.

DECIDED DECEMBER 3, 1991 -

RECONSIDERATION DENIED DECEMBER 18, 1991.

Murder. Barrow Superior Court. Before Judge McWhorter.

*Larry L. Duttweiler, Melodie L. Snell, Charlotta Norby*, for appellant.

*Timothy G. Madison, District Attorney, Jeffery G. Morrow, Assistant District Attorney, Michael J. Bowers, Attorney General, C. A. Benjamin Woolf, Staff Attorney*, for appellee.

## GA. ANN. CODE § 17-10-30

**Procedure for imposition of death penalty generally.**

(a) The death penalty may be imposed for the offenses of aircraft hijacking or treason in any case.

(b) In all cases of other offenses for which the death penalty may be authorized, the judge shall consider, or he shall include in his instructions to the jury for it to consider, any mitigating circumstances or aggravating circumstances otherwise authorized by law and any of the following statutory aggravating circumstances which may be supported by the evidence:

(1) The offense of murder, rape, armed robbery, or kidnapping is committed by a person with a prior record of conviction for a capital felony;

(2) The offense of murder, rape, armed robbery, or kidnapping was committed while the offender was engaged in the commission of other capital felony or aggravated battery, or the offense of murder was committed while the offender was engaged in the commission of burglary or arson in the first degree;

(3) The offender, by his act of murder, armed robbery, or kidnapping, knowingly created a great risk of death to more than one person in a public place by means of a weapon or device which would normally be hazardous to the lives of more than one person;

(4) The offender committed the offense of murder for himself or another, for the purpose of receiving money or any other thing of monetary value;

(5) The murder of a judicial officer, former judicial officer, district attorney or solicitor, or former district

attorney or solicitor was committed during or because of the exercise of his official duties;

(6) The offender caused or directed another to commit murder or committed murder as an agent or employee of another person;

(7) The offense of murder, rape, armed robbery, or kidnapping was outrageously or wantonly vile, horrible, or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim;

(8) The offense of murder was committed against any peace officer, corrections employee, or fireman while engaged in the performance of his official duties;

(9) The offense of murder was committed by a person in, or who has escaped from, the lawful custody of a peace officer or place of lawful confinement; or

(10) The murder was committed for the purpose of avoiding, interfering with, or preventing a lawful arrest or custody in a place of lawful confinement, of himself or another.

(c) The statutory instructions as determined by the trial judge to be warranted by the evidence shall be given in charge and in writing to the jury for its deliberation. The jury, if its verdict is a recommendation of death, shall designate in writing, signed by the foreman of the jury, the aggravating circumstance or circumstances which it found beyond a reasonable doubt. In nonjury cases the judge shall make such designation. Except in cases of treason or aircraft hijacking, unless at least one of the statutory aggravating circumstances enumerated in subsection (b) of this Code section is so found, the death penalty shall not be imposed. (Code 1933, § 27-2534.1, enacted by Ga. L. 1973, p. 159, § 3.)

## GA. ANN. CODE § 17-10-31

**Requirement of jury finding of aggravating circumstance and recommendation of death penalty prior to imposition**

Where, upon a trial by jury, a person is convicted of an offense which may be punishable by death, a sentence of death shall not be imposed unless the jury verdict includes a finding of at least one statutory aggravating circumstance and a recommendation that such sentence be imposed. Where a statutory aggravating circumstance is found and a recommendation of death is made, the court shall sentence the defendant to death. Where a sentence of death is not recommended by the jury, the court shall sentence the defendant to imprisonment as provided by law. Unless the jury trying the case makes a finding of at least one statutory aggravating circumstance and recommends the death sentence in its verdict, the court shall not sentence the defendant to death, provided that no such finding of statutory aggravating circumstance shall be necessary in offenses of treason or aircraft hijacking. This Code section shall not affect a sentence when the case is tried without a jury or when the judge accepts a plea of guilty. (Code 1933, § 26-3102, enacted by Ga. L. 1968, p. 1249, § 1: Ga. L. 1969, p. 809, § 1; Ga. L. 1973, p. 159, § 7.)